UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

THE HONORABLE GEORGE H. WU, JUDGE PRESIDING

FATEMEH JOHNMOHAMMADI, Plaintiff, vs. BLOOMINGDALE'S, INC., et al., Defendants.	)	No. CV 11-6434-GW-AJW

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Thursday, January 26, 2012, 9:27 A.M.

DEFENDANT'S MOTION TO COMPEL ARBITRATION & STAY PROCEEDINGS

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LOS ANGELES, CALIF.; THURSDAY, JANUARY 26, 2012; 9:27 A.M.

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THE COURT: Let me call the matter of Johnmohammadi. When you have all these letters in the last names, it's hard for me to do it.

MR. MOSS: Good morning, Your Honor. Dennis Moss appearing on behalf of plaintiff.

THE COURT: All right.

MR. MOSS: And I have a blue binder.

THE COURT: All right. I thought we were going to a paperless society.

MR. MOSS: I just thought it complimented the white and black one from the last one.

THE COURT: Okay. So it's neither good nor bad.

MR. CURTIS: Good morning, Your Honor. I'm John Curtis appearing for the defendant Bloomingdale's.

THE COURT: All right.

MR. CURTIS: I have with me Mr. Martin who is also representing Bloomingdale's.

THE COURT: All right.

We're here on this motion to compel arbitration, to stay. I've issued a tentative on this. I presume both sides have seen it.

MR. MOSS: Yes, Your Honor.

MR. CURTIS: Yes, Your Honor.

THE COURT: Somebody want to argue anything or do you want to submit?

MR. MOSS: The binder didn't turn blue until I read the tentative.

THE COURT: Okay.

MR. MOSS: On behalf of the plaintiff, there are several points I'd like to make. The right to engage in concerted activities is a substantive right.

Let's assume, if you will, that the contract to arbitrate was in exchange for a promise that you won't join a union.

THE COURT: Well, no. That wouldn't be quite analogous to what we have here.

MR. MOSS: Well, I think the reason it is is because the courts have recognized that participating in a class action is a form of concerted activity just as joining a union is a form of concerted activity.

THE COURT: Some courts have held that, some courts have held not. So it's not -- and, also, I would say that no court that's binding on this court has determined one way or the other.

MR. MOSS: Well, I think if you go back to the -- there were cases that, the old cases, *National Licorice Company* and the --

THE COURT: The operative word, however, being

"old cases."

MR. MOSS: Well, but the United States Supreme Court cases, the ***East Text*** case is, I think -- I haven't looked at it before I came here today; but the East Text case was a United States Supreme Court case that said that engaging in collective litigation is a form of concerted activity and --

THE COURT: Well, but let me just stop you. You can waive the right to strike; and if you can waive the right to strike, you can waive the right to participate in group litigation.

I mean, what's the difference?

MR. MOSS: Well, the difference is --

THE COURT: In other words, it's more important to engage in group litigation than it is to strike?

MR. MOSS: Well, you can't waive the right to join a labor organization. The only --

THE COURT: But we're not talking about that here. Nobody is saying that somebody was somehow barred or, you know, et cetera, from joining a union.

MR. MOSS: I understand that. But that's a form of concerted activity. The only place the right to strike is waived is in the exercise of concerted activity.

It's when emply -- and that makes it distinct. It's when employees join a union and they collectively

bargain that the right to strike -- they can waive the right to strike.

So that waiver is -- comes from the exercise of concerted activity. Here, the waiver was a condition of getting this arbitration clause.

And let's say they said to the employee: We'll give you extra money not to engage in -- it's a species of yellow dog contract.

You cannot engage in a concerted activity of joining together. Joining together like joining a union is different than a right to strike. They are tantamount to each other.

But -- and the ***East Text*** case clearly makes clear that litigation, collective litigation, in the United States Supreme Court case, is a form of concerted activity.

The issue -- the court references, I think it's footnote 28. But before you get to footnote 28, on pages -- I think it's 4, 5, and 6 of the ***D.H. Horton*** decision.

They talk about the giving up -- that the right to engage in concerted activity arises under public policy; and you cannot -- you cannot have a contract that controverts that public policy; and they cite the ***JIK*** case and the ***J.H. Stone & Sons*** cases.

And they said in the ***J.H. Stone*** case -- and this is from the ***D.H. Horton*** decision -- the Seventh Circuit

affirmed the board's holding described in the contract clause as a *per se* violation of the act even if entered into without coercion.

So you don't need coercion in order to have a void contract provision that denies concerted activity.

THE COURT: Let me stop you. We're not even talking about that here. In other words, we're talking about an arbitration situation. You're talking not about litigation, normal litigation. We're talking about arbitration and the limitation insofar as arbitration is concerned of not allowing for class arbitration.

So it's a step away from, a step away from, a step away from, a step away from, a step away from so you're really outside the entire premises at this point in time.

MR. MOSS: Well, but the courts have recognized that arbitration is tantamount to being in court so the question is --

THE COURT: Oh, actually, the courts have recognized that arbitration is distinct from being in court. In fact, the whole point of arbitration is to not be in court.

MR. MOSS: No, but you can litigate -- you're not depriving somebody of due process rights, for example, by having a litigation before a neutral arbitrator.

And whether it's a class action in court or a

class action in arbitration, a class arbitration, they invoke concerted activity, both involved concerted activity.

THE COURT: No, let me just stop you. I understand your argument. I just don't buy it.

MR. MOSS: Well, let me address the further argument and, that is, the court's suggestion that the -- in connection with primary jurisdiction of the NLRB.

There is an unfair labor practice charge specifically arising from the conduct of conditioning this arbitration right on waiving rights to engage in concerted activity.

That is pending before the National Labor Relations Board. In *D.H. Horton*, in footnote 28, they say: We haven't decided that yet. It's definitely something they're going to have to decide.

THE COURT: Let me stop you. I agree with that argument. It seems to me that is a point that I have to consider and that is the point that I was going to be addressing with the defendants.

So you don't really need to make the point at this point time. You can just simply respond to their point. Because I do agree with you. If, in fact, the NLRB is considering this issue, you know, why shouldn't I wait until I see what the NLRB does.

MR. MOSS: And just from the plaintiff's

perspective, we would have no problem with that.

THE COURT: I understand that.

MR. MOSS: Okay; thank you, Your Honor.

THE COURT: That's why it's blue because it's neither white nor black.

Let me hear from the defense.

MR. MARTIN: Good morning, Your Honor. David Martin on behalf of Bloomingdale's. The two issues are, as you point out in the tentative, Your Honor, you have the -- you can determine whether the contract is legal or illegal; and you've determined that it is legal and that *Horton* doesn't apply.

THE COURT: I think the only thing I said is it's not illegal.

MR. CURTIS: Not illegal.

And that *Horton* doesn't supply; and I think once you have reached that conclusion that *Concepcion* is absolutely and abundantly clear; that there is -- that it compels that the arbitration agreement be enforced.

THE COURT: Well, let me just put it this way. The only reason that I -- I don't really decide the underlying issue of *Horton*.

I basically say that this situation that we have here is different than *Horton* because of the voluntary agreement by employees that is described in the papers,

et cetera.

So, therefore, I don't need to decide if *Horton* was right or wrong or am I bound by *Horton* or not. I'm saying no matter how you slice it or dice it, this case is different from *Horton* and, therefore, in light of this case, I find that the law is more consistent with the view that there can be a waiver of the right to have a class action arbitration or class arbitration.

MR. MARTIN: The point I was trying to make, Your Honor, was simply that *Concepcion* says that if you have a valid arbitration agreement, it should be compelled and enforced; and in that situation, there's no reason to delay the proceedings.

THE COURT: But let me ask you. Is the defendant conceding that the issue as to whether or not the defendant employer is engaging in an unfair labor practice by doing this, why wouldn't I wait and see whether and what happens just as -- because, you know, why would I be compelling or is it a situation where if I were to compel, in other words, I would basically be compelling the plaintiffs, based upon something that may turn out to be held to be an unfair labor practice, which seems to me to be somewhat inconsistent.

MR. MARTIN: Let me go back for a little bit about where we are right now on the NLRB front. Yes, plaintiffs have filed an unfair labor practice charge.

There has been no Complaint, no decision to file a Complaint against the company. It is in the very nascent stages. In fact, Bloomingdale's position statement is due tomorrow.

Assuming, after they review a position statement, that they are going to file a formal Complaint against the company --

THE COURT: Let me stop you. Would you -- both sides, I think, would have to agree that this particular aspect is not really well-fleshed out in the materials that you've given me so far.

Because, in other words, nobody particularly said, you know, how this thing is going to proceed or would proceed in front of the NLRB. In other words, is it a situation where the NLRB may be coming down with a decision fairly quickly or is it going to be a situation where it will languish in front of the NLRB for years.

If it's going to languish in front of the NLRB for years, I'm not inclined to stay. But if it's a situation where, based on the record of the NLRB -- but, frankly, as an aside, I think I understand what the record is in front of the NLRB and the problems the NLRB has had, you know, in its composition, et cetera, et cetera.

So I'm not necessarily expecting anything to come out really quickly. But if there is some evidence that

something fairly quickly can happen, I'm willing to stay.

MR. MARTIN: Your Honor, as I understand it and as I told my client is that there has been no Complaint filed and that it could take an exceptionally long time.

I also understand, Your Honor --

THE COURT: Okay. But let me just stop. That stuff hasn't been presented to me by both sides and I want it presented to me by both sides.

If in the end of this hearing it's going to come down to: Well, let's see what the NLRB does or the argument is that we should wait or we shouldn't wait.

I don't feel comfortable with what you guys have given me so far to make that decision, but I would make the decision once I got the input from both sides.

MR. MOSS: Well, Your Honor, do you want us to write you with that information?

THE COURT: Yes. In other words, I don't usually don't like the oral stuff because I forget everything that you guys say to me, you know, like three seconds after I've heard it.

MR. MOSS: Well, procedurally --

THE COURT: Well, but procedurally let me just ask you this. Is that the only real issue at this point in time given the fact I have already indicated in my tentative how I view the *Horton* issue, you know, I think I pretty much

made myself clear on that; and on that, I'm willing to make a decision on now.

MR. MARTIN: Yeah. And just to be clear you also raised in your tentative the issue about dismissal an as opposed to stay.

THE COURT: Yes.

MR. MARTIN: The defendant would have no problem. I think it's well within your discretion to do either --

(Counsel overtalking; not reported.)

THE COURT: But, obviously, if I did a dismissal in lieu of stay, then it would be with the understanding that the defendant would be waiving any statute of limitations arguments and things of that sort.

MR. MARTIN: That's fine.

THE COURT: Okay.

MR. MOSS: Well, I think -- I think what we should do at this point is submit something in writing describing what the NLRB'S procedures are because there's a -- I'll be very short on this.

But there's a process where they've taken my charge, they've taken an affidavit from my client, they've taken a position from us, they do that from the other side, and usually it's a fairly short period of time they decide to issue a Complaint.

And that decision is a decision by the regional

office that it presumptively has merit and that they issue a Complaint. They actually represent the party.

THE COURT: Sure. Let me also ask you this question. Will they accept or consider, for example, the fact that there is a litigation that involves this matter and, therefore, that they should perhaps be moving with a little bit more speed if they can on the particular matter?

Or is it a situation where they're going to ignore the fact there's a -- in fact, may consider the fact that there is a pending litigation as a reason for them not to move fast on that request.

MR. MOSS: In the charge, we pointed out to them that the charge arises from them raising the affirmative defense in litigation.

And so the court -- the NLRB has all the information regarding the -- they have the Complaint, they have the Answer with the affirmative defense. We even gave them the motion papers showing that their defense relates to the concerted activity issue.

But my experience is that they will rule on whether to issue a Complaint within the next several months; and perhaps what we do is wait and maybe come back in a couple of months.

And if they haven't ruled yet, then you might change your position.

THE COURT: Well, what I want first of all, however, is just a little bit further explanation from both sides as to this NLRB issue so that I can understand better because, I obviously -- well, actually I did a little bit of NLRB law in '75, not much since then and I think things have changed so when can you --

MR. MOSS: Unfortunately, they haven't changed that much.

THE COURT: And certainly not for the better in your view.

Let me just ask. I presume since the plaintiff is going to be making the contention, when do you think you can give me something and then I'll give the defense a chance to respond? And, again, obviously, there obviously is no major rush at this point in time so whatever --

(Counsel overtalking; not reported.)

MR. MOSS: Well, in terms of the -- just explain the procedure to the court of the NLRB.

THE COURT: Yes.

MR. MOSS: I can get you something by --

THE COURT: And basic pitching the argument as to why I should stay, you know, based upon that.

MR. MOSS: Umm, I can get you that in two weeks.

THE COURT: Sure; okay. Two weeks would be by the 2nd of February; and how long will it take the defense --

and obviously serve the defense on that date, too.

How long is it going to take the defense to give me a response?

MR. MARTIN: Two weeks.

THE COURT: Two weeks? Okay. So then by the 16th. I'll have you guys back here on the 23rd.

(Court and the clerk conferred.)

THE COURT: 2nd and 16th and give me a courtesy copy on the 16th. Then I'll have you guys back here on the 23rd. All right?

MR. MOSS: Okay. Thank you, Your Honor.

THE COURT: Thank you.

MR. MARTIN: Thank you.

THE COURT: Have a nice day.

MR. MARTIN: That's at 8:30, Your Honor?

THE COURT: 8:30, yes.

(At 9:42 a.m. proceedings were concluded.)

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CERTIFICATE

I hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Date: February 2, 2012

/s/ PAT CUNEO

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